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In the Supreme Court of the United States

Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman, in their individual capacities,

Petitioners,

v.

Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether courtroom security personnel executing a lawful judicial order within a courtroom and under the immediate direction and supervision of a judge are entitled to quasi-judicial absolute immunity from federal constitutional claims.

LIST OF PARTIES

The parties to this proceeding are petitioners/defendants deputy sheriffs Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman, in their individual capacities, and respondent/plaintiff Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners deputy sheriffs Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman (collectively "petitioners"), in their individual capacities, respectfully petition for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on October 16, 2001.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed in part the decision of the United States District Court for the Northern District of Illinois denying petitioners' motion to dismiss. The Seventh Circuit's opinion is reported at 270 F.3d 430 (7th Cir. 2001) and is reprinted in the Appendix hereto at App. 1-App. 23. The district court's opinion is published at 2000 U.S. Dist. LEXIS 5861 and is reprinted in the Appendix hereto at App. 24-App. 41.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek review was issued on October 16, 2001. (App. 1-App. 23.) This petition was timely filed within 90 days of the issuance of that opinion. On October 29, 2001, the United States Court of Appeals for the Seventh Circuit granted petitioners' motion to stay the issuance of the mandate pending the filing of the subject petition in this Court.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

> §1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

55 ILCS 5/3-6017

> §3-6017. Sheriff custodian of courthouse and jail. He or she shall have the custody and care of the courthouse and jail of his or her county, except as is otherwise provided.

55 ILCS 5/3-6023

> §3-6023. Attendance at courts. Each sheriff shall, in person or by deputy, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court. Court services customarily performed by sheriffs shall be provided by the sheriff or his deputies, rather than by employees of the court, unless there are no deputies available to perform such services. The expenses of the sheriff in carrying out his duties under this Section, including the compensation of deputies assigned to such services, shall be paid to the county from fees collected pursuant to court order for services of the sheriff and from any court services fees collected by the county pursuant to Section 5-1103, as now or hereafter amended.

STATEMENT OF THE CASE

I. Background

Under Illinois law, sheriffs "have the custody and care of the courthouse and jail of his or her county, except as is otherwise provided." *See* 55 ILCS 5/3-6017 (2002). Illinois sheriffs "shall, in person or by deputy, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court." *See* 55 ILCS 5/3-6023 (2002). The duties of sheriffs are analogous to those of a common-law bailiff and are typical of the operations in many of our nation's courts. Sheriffs and bailiffs in other jurisdictions, particularly in our most populous states, have the same duty to maintain

security and order within courtrooms.[1]

On November 18, 1997, Michael Sheahan, the Sheriff of Cook County, Illinois ("Sheriff Sheahan" or the "Sheriff") and his deputy sheriffs had a statutory duty to preserve security in the courtroom of Judge Michael Jordan of the Circuit Court of Cook County, Illinois, and obey the lawful orders of Judge Jordan. On that day, respondent Marcella Richman appeared with her son, Jack Richman, before Judge Jordan on a traffic citation issued against her. (Am. Comp., count I at ¶¶11-12.) The case was called for hearing, and the court determined that the matter should be reset to a future date. (Am. Comp., count I at ¶¶11-12.) As he continued respon-

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[1] In federal courts, for example, United States marshals may employ bailiffs "to attend [to] the court [and] maintain order." *See* 28 U.S.C. §755 (2002). *See also* 28 U.S.C. §672 (2002) (stating that this Court may appoint a marshal to attend the Court at its sessions and execute all orders issued by the Court or a member thereof). Like Illinois law, New York law provides that sheriffs and their deputies attend upon courts. *See, e.g., Gribetz v. Evans*, 113 A.D.2d 376, 496 N.Y.S.2d 465 (N.Y. App. Div. 1985). California law "provides that county peace officer[s] includes employees of the sheriff's office who attend court sessions, preserve order in the courtroom, maintain the security of prisoners making court appearances, and take responsibility for jurors." *Biggers v. Workers' Comp. Appeals Bd.*, 69 Cal. App. 4th 431, 81 Cal. Rptr.2d 628 (Cal. Ct. App. 1999) *citing* Cal. Gov't. Code §20440 (2002). Florida sheriffs are obligated to "[a]ttend all terms of the circuit court and county court held in their counties." Fla. Stat. §30.15(1)(c) (2002). Texas law provides that bailiffs "shall attend each session of the court to which he is appointed and perform the official duties performed by sheriffs and deputies in the district courts of this state" and "shall also perform services requested by the judge." Texas Gov't Code Ann. §53.035(b) (2000).

dent's traffic case, Judge Jordan ordered respondent and her son to stop speaking. (Comp., count I at ¶13.) However, Mr. Richman continued speaking. (Comp., count I at ¶14.) As Mr. Richman continued, Judge Jordan ordered several deputy sheriffs to restrain Mr. Richman and take him into custody. (Comp., count I at ¶14; Am. Comp., count I at ¶14.) Mr. Richman continued to speak out. For each of Mr. Richman's successive attempts to speak out, Judge Jordan increased the penalty in successive increments of days in custody to a total of one hundred twenty days. (Comp., count I at ¶13.) At Judge Jordan's direction, several deputy sheriffs began to take Mr. Richman into custody and struggled to handcuff him. (Comp., count I at ¶¶15, 17 and 20.) Thereafter, one or more deputy sheriffs noticed that Mr. Richman had stopped breathing. (Am. Comp., count I at ¶21.) Emergency assistance was called. (Am. Comp., count I at ¶27.) Several paramedics subsequently entered the courtroom, administered CPR, and took Mr. Richman to the hospital where he was pronounced dead. (Am. Comp., count I at ¶27.)

II. Proceedings Below

On November 17, 1998, respondent Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, filed a complaint against petitioners alleging violations of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983 ("Section 1983"). The jurisdiction of the United States District Court for the Northern District of Illinois was invoked under 28 U.S.C. §§1331, 1343 and 1367.

On April 23, 1999, petitioners and their co-defendants, Sheriff Sheahan and the County of Cook (the "County"),

filed a 12(b)(1) and 12(b)(6) motion to dismiss respondent's complaint. Thereafter, on May 28, 1999, respondent filed an amended complaint that sought damages under Section 1983, Illinois' Wrongful Death Act, 749 ILCS 180/1 and Illinois' Survival Act, 755 ILCS 5/27-6.

After amendment, petitioners, Sheriff Sheahan and the County, adopted their previous motion to dismiss and, thus, moved to dismiss count I (Section 1983 against all petitioners), count III (Section 1983 against the four petitioners who allegedly restrained respondent Marcella Richman), count V (state law wrongful death claim against all petitioners and Sheriff Sheahan) and count VI (state law survival claim against all petitioners and Sheriff Sheahan) of respondent's amended complaint on the grounds of, *inter alia*, quasi-judicial absolute immunity. Petitioners argued in their motion that they were court security personnel executing a lawful judicial order within a courtroom while under the immediate direction, orders and supervision of a judge, and, thus, were entitled to quasi-judicial absolute immunity as to all actions brought against them in their individual capacities.

In addition, Sheriff Sheahan argued that the Eleventh Amendment barred respondent's official capacity claims in counts II and IV for failure to train and supervise deputy sheriffs because the Sheriff acted as an arm of the State of Illinois when training deputy sheriffs to perform duties as a state official such as the execution of court orders.

All petitioners and Sheriff Sheahan argued that the district court lacked subject matter jurisdiction over respondent's state law claims in counts V and VI on the grounds that the deputy sheriff petitioners acted as an arm of the State of Illinois when they enforced Judge Jordan's order to restrain Mr. Richman and, as a result,

respondent's state law tort claims were really tort claims against Illinois and under Illinois law, the Illinois Court of Claims had exclusive jurisdiction over such claims.

On March 31, 2000, the district court issued a memorandum opinion and order granting in part and denying in part petitioners' motion to dismiss. (App. 24-App. 41.) The district court dismissed respondent's claims against defendant County of Cook (App. 27), dismissed the state law claims against petitioners Kelly Jackson, Laura Loken, Timothy McPhillips, and Michelle Zimmerman, the four deputies who allegedly seized respondent Marcella Richman (App. 37, 41), dismissed respondents' claims for punitive damages under state law (App. 40, 41) and dismissed respondents' claim for punitive damages against Sheriff Sheahan in his official capacity (App. 40, 41). The district court denied the claims of quasi-judicial absolute immunity, sovereign immunity, Eleventh Amendment immunity and qualified immunity. Petitioners and Sheriff Sheahan appealed the denial of their claims of immunity.

On October 16, 2001, a divided panel of the Court of Appeals for the Seventh Circuit issued an opinion affirming in part and reversing in part the decision of the district court. *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001). (App. 1-App. 23.) The majority held that deputy sheriffs providing courtroom security are not entitled to quasi-judicial absolute immunity when they restrain a person pursuant to the direct order of a judge. *Richman*, 270 F.3d at 434-439. (App. 4-App. 12.) The majority also affirmed the denial of Sheriff Sheahan's claim of sovereign immunity. *Richman*, 270 F.3d at 439-440. (App. 12-App. 15.) With respect to respondent's state law tort claims, the majority reversed the decision of the district court denying petitioners' motion to dismiss counts V and

VI of the amended complaint and held that the Illinois Court of Claims had exclusive jurisdiction over these tort claims. (App. 15-App. 19.) The majority found that the deputy sheriffs acted as an arm of the State of Illinois when they executed Judge Jordan's order. Consequently, the majority held that the deputy sheriffs' acts were attributable to the State for purposes of sovereign immunity. *Richman*, 270 F.3d at 442. (App. 18.)

In dissent, Judge Bauer discussed the case of *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). Like the instant case, *Martin v. Hendren* "involves police officers under the immediate direction and supervision of a judge, following the judge's orders to restore or maintain order in the court instanter, doing precisely what they are sworn to do." *Richman*, 270 F.3d at 443 (Bauer, J., dissenting). (App. 20.) Judge Bauer stated that he would follow the decision of the Eighth Circuit in *Martin v. Hendren* and "hold the bailiffs to be cloaked with immunity when carrying out the orders of the court relating to the conduct of court proceedings themselves." *Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 23.)

In connection with the conflict raised in the dissent, the majority noted that it had circulated its opinion to the full court before release in accordance with Seventh Circuit Rule 40(e). *Richman*, 270 F.3d at 439, n.5. (App. 12.) The court further noted that a "majority did not favor a rehearing *en banc* on the question of the deputies' entitlement to quasi-judicial immunity." *Id.* (App. 12.) Judge Bauer voted to grant rehearing *en banc*. *Id.* (App. 12.)

SUMMARY OF THE ARGUMENT

This case has national importance because of its impact on the maintenance of security and order in the courts of this nation. Courtrooms, particularly in this day and age, should be sacrosanct, and judges should be secure in the knowledge that courtroom bailiffs and security personnel will enforce their orders immediately and without pause. As the Eighth Circuit observed in *Martin v. Hendren*, "because judges frequently encounter disruptive individuals in their courtrooms, exposing bailiffs and other court security officers to potential liability for acting on a judge's courtroom orders could breed a dangerous, even fatal hesitation." *Martin v. Hendren*, 127 F.3d at 722; *see also Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 22.) Requiring courtroom security personnel to weigh each court order within the context of potential liability creates a breeding ground for such "fatal hesitation."

Bailiffs fearful of individual capacity lawsuits for carrying out direct orders to restrain, remove or arrest unruly or disruptive parties will understandably hesitate to act. It is imperative that the courts make clear to bailiffs and security personnel working in the courtroom that quasi-judicial immunity will protect them from civil damages and protracted litigation when obeying and enforcing direct orders of the court. Absolute immunity for bailiffs serves the important public interest[2] of ensuring

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[2] *See Pierson v. Ray*, 386 U.S. 547, 554 (1967) (noting that absolute judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty

(continued...)

open, safe and secure courtrooms. As Justice Stevens of this Court has observed, "[f]reedom of access to the courts is a cherished value in our democratic society." *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070 (1985) (Stevens, J., concurring in dismissal for want of jurisdiction). In order for our justice system to function in this time of turmoil, courtrooms should be a bastion of peace where the business of a democracy can be carried out without fear.

In his dissent in *Richman*, Judge Bauer stated that he "would reverse the district court and hold the bailiffs to be cloaked with immunity when carrying out the orders of the court relating to the conduct of court proceedings themselves." *Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 23.) Prior to the Seventh Circuit's decision in *Richman*, the Eighth and Tenth Circuits recognized the importance of granting bailiffs such immunity. *See Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997); *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989). The majority in *Richman* acknowledged that it reached the opposite conclusion of the Eighth Circuit. *Richman*, 270 F.3d at 436. (App. 6-App. 7.)

If the decision in *Richman* is allowed to stand, bailiffs and security personnel will continue to engage in the inevitable second-guessing of court orders. More importantly, judges will be required to attempt to maintain order with the knowledge that their orders are being second-guessed. A bailiff's indecision could cause a "fatal

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(...continued)
to exercise their functions with independence and without fear of consequences" *quoting Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)).

hesitation" at a time of need and, thus, undermine the functioning of a public court. The potential for such a breakdown in our judicial system is a poignant reminder of Justice Stevens' statement that open access to the courts is a cherished value that should not be diminished or lost.

The Court should grant this petition in order to resolve the very serious conflict among the circuits that *Richman* has created.

REASONS FOR GRANTING THE WRIT

The majority opinion in *Richman* held that courtroom bailiffs under the immediate and direct supervision of a judge are not entitled to quasi-judicial immunity from federal constitutional claims based upon the bailiffs' execution of a lawful judicial order in the courtroom while court was in session. The decisions of *Martin v. Hendren* and *Valdez* reach the opposite conclusion. *Richman*, therefore, creates a conflict with the Eighth and Tenth Circuits.

The *Richman* decision also applies the doctrine of quasi-judicial immunity in a manner that conflicts with *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286 (1991), as well as earlier decisions of this Court in *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335 (1871), *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978) and *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988).

In accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), the Court should grant this petition.

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THREE CIRCUITS REGARDING THE ISSUE OF WHETHER BAILIFFS ARE ENTITLED TO QUASI-JUDICIAL ABSOLUTE IMMUNITY WHILE ENGAGED IN THE PROMPT ENFORCEMENT OF JUDICIAL ORDERS NECESSARY FOR THE PRESERVATION OF SAFETY AND SECURITY IN THE NATION'S COURTS.

As Judge Bauer observed, the instant case "is virtually on all fours" with *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). *See Richman*, 270 F.3d at 443 (Bauer, J., dissenting). (App. 19.)

In *Martin*, the plaintiff's son appeared before a state court on a traffic charge. Without permission, the plaintiff Martin approached the bench. The judge twice told Martin to sit down. Martin, like Mr. Richman, ignored the court. The judge then ordered Officer Hendren to remove Martin from the courtroom. A struggle ensued in which Martin was struck. The judge held Martin in contempt and ordered Hendren to handcuff her. Hendren forced Martin face down on the floor and handcuffed her. The Eighth Circuit stated that a judge's absolute immunity extends to public officials for "acts they are specifically required to do under court order or at a judge's direction." *Martin v. Hendren*, 127 F.3d at 721 *citing Robinson v. Freeze*, 15 F.3d 107, 109 (8th Cir. 1994). The court then held that:

> Like other officials, bailiffs enjoy absolute quasi-judicial immunity for actions "specifically ordered by the trial judge and related to the judicial function." *Id.* In subduing Martin, Hendren was acting as a *de facto* bailiff, obeying specific judicial commands to restore order in the courtroom. Those orders unquestionably related to the judicial function. *See Mireles v. Waco*, 502 U.S. 9,

> 12-13, 116 L. Ed. 2d 9, 112 S. Ct. 286 (1991) (per curiam); *Terry v. State*, 303 Ark. 270, 796 S.W.2d 332, 335 (Ark. 1990). Hendren is thus entitled to absolute quasi-judicial immunity from Section 1983 liability for carrying out the judge's orders to handcuff Martin and remove her from the courtroom.

Id.

Martin also argued that Hendren ceased to act in a quasi-judicial capacity when he applied excessive force. The Eighth Circuit rejected this argument and observed that under the reasoning of *Mireles v. Waco*, 502 U.S. 9 (1991), it is the nature of the function being performed and not the particular act itself that controls the judicial immunity analysis. The Eighth Circuit observed that a grant of quasi-judicial immunity to bailiffs who enforced direct court orders would be "illusory" if it were lost the moment someone alleges that the bailiff acted improperly. *Martin v. Hendren*, 127 F.3d at 722. To ensure that it was not "an illusory concept," the Eighth Circuit concluded that Hendren was entitled to quasi-judicial absolute immunity for the enforcement of lawful judicial orders in the judge's courtroom and presence. *Id.* The Tenth Circuit reached the same conclusion in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989).

Like the plaintiffs in *Richman* and *Martin v. Hendren*, the plaintiff in *Valdez* continued to exchange words with a state court judge hearing a traffic case while court was in session—and after being admonished to cease talking. After the admonition, the plaintiff Valdez exclaimed a profanity at the judge who then held Valdez in contempt and ordered him to await sentencing outside the courtroom. Valdez then filed federal constitutional claims

against the officers who detained him pursuant to the court's order.

Like the Eighth Circuit in *Martin v. Hendren*, the Tenth Circuit held that the officers were absolutely immune from suit and stated that:

> Enforcing a court order or judgment is intrinsically associated with a judicial proceeding. [citation omitted] If losing parties were free to challenge the will of the court by threatening its officers with harassing litigation, the officers might neglect the execution of their sworn duties. . . . Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.

Valdez, 878 F.2d at 1288. The Tenth Circuit explained the public policy underlying the grant of quasi-judicial absolute immunity to bailiffs enforcing orders in the judge's courtroom and presence:

> Tension between trial judges and those officials responsible for enforcing their orders inevitably would result were there not absolute immunity for both. [citation omitted] Officials employed to implement facially valid court orders could choose: They may disregard the judge's orders and face discharge, or worse yet criminal contempt, or they may fulfill their duty and risk being hauled into court. Judge Learned Hand recognized years ago that the fear of suit will "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching dis-

> charge of their duties." [citation omitted] Officials such as the defendants must not be required to act as pseudo-appellate courts scrutinizing the orders of judges. [citation omitted] The public interest demands strict adherence to judicial decrees. . . . [T]he public interest in the enforcement of court orders that is essential to the effective functioning of our judicial process far outweighs the benefit to be gained by providing the defendants . . . with only limited immunity.

Valdez, 878 F.2d at 1289. The Tenth Circuit also noted that the grant of absolute immunity does not give judges and their courtroom personnel unfettered discretion because "unscrupulous judges are not totally insulated from the public will. Even judges are subject to professional discipline, constitutional or statutory removal, or in more egregious cases, criminal prosecution . . . ." *Id.*

The majority in *Richman* reached an opposite result from the decisions of the Eighth Circuit in *Martin v. Hendren* and the Tenth Circuit in *Valdez*. Instead, the majority in *Richman* chose to follow another Tenth Circuit decision, *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990), a case in which the plaintiff sued two deputy sheriffs for using excessive force when they arrested her at a hospital. *See Richman*, 270 F.3d at 435-436. (App. 6.) *Martin v. Board of County Commissioners* is, however, inapposite to the instant case. As Judge Bauer observed in his dissent:

> The tenth circuit case [*Martin v. Board of County Commissioners*] involved police conduct in serving a bench warrant . . . . I have no quarrel with the result reached by the tenth circuit case; it differs not at all from the run-of-the-mill arrests

> made pursuant to any judicial warrant and, since the arrest takes place away from the courtroom and away from the watchful eye of the judicial officer who issued the warrant, the conduct of the police is more likely to require a closer scrutiny. Nor is the immediate service of the warrant necessary to provide the court with the proper decorum needed to continue the work of the court.

Richman, 270 F.3d at 443 (Bauer, J., dissenting). (App. 19-App. 20.) Indeed, the *Richman* majority failed to recognize the difference between the enforcement of judicial orders within the courtroom and the enforcement of orders outside of the courtroom and outside the presence of the judge. When bailiffs in the courtroom enforce a judge's direct orders, they do so under the judge's direct and immediate supervision. Consequently, if a judge witnesses a bailiff improperly enforcing his or her order, he or she can immediately order the bailiff to stop. The judge's immediate direction and supervision of courtroom security personnel is the crucial factual difference between *Martin v. Board of County Commissioners* and *Richman*, *Martin v. Hendren* and *Valdez*.

When it declined to follow *Martin v. Hendren* and *Valdez*, two cases directly on point, the Seventh Circuit created a significant conflict among the circuits regarding the nature of immunity afforded to bailiffs enforcing judicial orders in the courtroom and in the judge's presence. The Court should grant the writ to resolve this very serious conflict.

II. THE COURT SHOULD CORRECT THE MISAPPLICATION OF QUASI-JUDICIAL ABSOLUTE IMMUNITY APPLIED BY THE MAJORITY IN *RICHMAN* BECAUSE IT CONFLICTS WITH THIS COURT'S DECISION IN *MIRELES v. WACO* AND OTHER DECISIONS FROM THIS COURT CONSTRUING ABSOLUTE JUDICIAL IMMUNITY.

"The contempt power lies at the core of the administration of a State's judicial system." *Juidice v. Vail*, 430 U.S. 327, 335, 97 S. Ct. 1211 (1977). Courtroom security cannot be maintained unless judges can direct a member of the executive branch to enforce contempt orders and orders to arrest or restrain unruly individuals in court. Under the approach of the majority in *Richman*, judges have absolute immunity for the orders they give, but bailiffs who enforce such orders in court in the judge's presence only have qualified immunity. In this regard, the majority acknowledges the problem but stops short of providing a workable solution:

> A secure courtroom is necessary to protect the judicial function from interference or intimidation; this function is adequately protected by immunizing a judge's order to restrain a person, *see Mireles*, 502 U.S. at 12-13, and by barring lawsuits that challenge a judge's decision through claims at officers who do nothing more than implement it. [citation omitted] It is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it.

Richman, 270 F.3d at 438-439. (App. 11-App. 12.) At the end of the day, a person unhappy because a judge ordered his removal from a courtroom, but mindful of the

parsing in *Richman*, can sidestep the purported judicial immunity by alleging a wrongful execution of the order—thus dragging the judge's order and ostensible absolute immunity into a mire of collateral litigation.

This Court has recognized that "judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225, 108 S. Ct. 538, 543 (1988). The central analytical problem with the majority opinion in *Richman* is its cramped view of judicial immunity.

This Court has long held that judicial immunity can be overcome in only two ways. First, a judge is not immune from liability for nonjudicial conduct, such as actions performed in an administrative capacity. *Forrester*, 484 U.S. at 227-229; *Stump v. Sparkman*, 435 U.S. 349, 360, 98 S. Ct. 1099 (1978). Second, a judge is not immune "for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12, 112 S. Ct. 286 (1991); *see also Stump*, 435 U.S. at 356-357; *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 351 (1871).

Consequently, the question of a judge's immunity does not turn on whether or not the judge engaged in willful or malicious conduct. A long line of precedent from this Court demonstrates that this question turns instead on whether the judge engaged in non-judicial conduct or acted in the complete absence of all jurisdiction. With respect to bailiffs enforcing judicial orders in the courtroom—court personnel whose immunity must mirror the immunity afforded to judges—the majority in *Richman* abandons this approach and replaces it with an analysis of whether bailiffs wrongfully executed the judge's order

in his presence. To be sure, a plaintiff could not evade the application of absolute judicial immunity simply by alleging that the judge acted maliciously or wrongfully. Yet, that is exactly the approach that the majority in *Richman* embraces with respect to courtroom security performing the quasi-judicial function of enforcing judicial orders in a courtroom in the presence of a judge.[3]

Thus, under *Richman*, a plaintiff could not sue a bailiff for enforcing a judge's order in the courtroom but could sue for the alleged wrongful execution of such an order. The limited hybrid form of absolute immunity that the *Richman* majority would give to courtroom security personnel is nothing more than an "illusory" promise.

In addition to misapplying this Court's precedents regarding the application of judicial immunity, *Richman* also conflicts with *Mireles*.[4] In *Mireles*, the plaintiff

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[3] The same considerations which support the application of a functional approach to the grant of absolute immunity to judges has also been applied to prosecutors when functioning as an advocate for the state. *See Imbler v. Pachtman*, 424 U.S. 409, 422-423, 96 S. Ct. 984 (1976) (stating that the common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges acting within the scope of their duties).

[4] In his dissent in *Mireles*, Justice Scalia stated that the fact pattern of *Mireles* was "so extraordinary that it [did] not warrant the expenditure of [the Court's] time." *Mireles*, 502 U.S. at 15 (Scalia, J., dissenting). Petitioners submit, however, that disturbances are not unique or isolated phenomena in "grass roots" courts. Bailiffs are often called on to quell outbursts in court. *Martin v. Hendren*, *Valdez* and *Richman* are three examples of cases where a disturbance occurred in traffic court and a judge ordered courtroom security personnel to

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alleged that a judge ordered several police officers "to forcibly and with excessive force seize and bring plaintiff into his courtroom." *Mireles*, 502 U.S. at 10. This Court held that the judge was absolutely immune from suit because the order to seize plaintiff with excessive force was a judicial act and was not taken in the absence of jurisdiction. *Id.* at 12-13. As this Court observed, "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Id.* at 13.

Under this functional approach, petitioners clearly performed a quasi-judicial function when they enforced Judge Jordan's order to take Mr. Richman into custody for his repeated failures to heed the judge's requests to refrain from interrupting the court. If the judge in *Mireles* had absolute judicial immunity from suit based upon an alleged order to use "excessive force" against the plaintiff, then petitioners should have absolute quasi-judicial immunity for executing, in Judge Jordan's presence, his lawful order to restrain and arrest Mr. Richman. The application of a functional approach preserves

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restrain and arrest the person causing the disturbance. A fourth example is the recent district court case of *Rodgers v. County of Ionia*, 2001 U.S. LEXIS 4445 (W.D. Mich. March 26, 2001). In dismissing a lawsuit that a disgruntled litigant filed against a court bailiff over an altercation in traffic court, the district court followed *Martin v. Hendren* and stated that "[t]he rationale for extending absolute judicial immunity to a bailiff carrying out court orders is obvious. Otherwise, personnel carrying out judicial orders would become 'lightning rods' for lawsuits and the purpose of judicial immunity (the creation of a sphere of safety in which judicial decisions can be free from reprisals from unhappy litigants) would be quickly defeated." *Rodgers*, 2001 U.S. Dist. LEXIS 4445 at *11.

the grant of absolute immunity that is vital to our judicial system. Anything less would serve to foster claims brought against courtroom security personnel and to weaken the authority of the judge within his or her courtroom.

Because the majority decision in *Richman* conflicts with *Mireles* and earlier decisions construing absolute judicial immunity, this Court should grant the writ.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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